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ABD RAHIM ABD RAHAMAN

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: B-09-62-07]

C

7 JUNE 2010

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Conviction on 22 counts of sodomy - Appellant an HIV patient - Sentenced to 60 years' imprisonment - Whether adequate - Whether charges discriminatory of men - Whether charges unconstitutional - Penal Code, ss. 377B, 377C - Criminal Procedure Code, s. 289 - Federal Constitution, art. 8(1), (2)*

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Before two Sessions Courts below, the appellant, an HIV patient, had pleaded guilty to and been convicted of 22 counts of sodomy under s. 377B of the Penal Code and was sentenced to a total of 60 years' imprisonment and eight strokes of the rotan, with the sentences ordered to run consecutively. Having been unsuccessful in his appeal to the High Court, the appellant appealed further and, for the first time, argued before the learned justices of the appellate court essentially that: (i) s. 377B of the Penal Code offended art. 8(1) and (2) of the Federal Constitution ('FC'); (ii) the sentences meted out were too severe and contrary to art. 8 of the Federal Constitution when read with s. 289 of the Criminal Procedure Code ('CPC'); (iii) he had not drugged the 14-year old victim prior to sodomising him, and in any case there was consent given by the victim; and (iv) the trial judge(s) made a wrong finding of fact that sodomy offences were on the increase in Malaysia. More particularly, it was argued that s. 377B (and s. 377A for that matter) was discriminatory of men as opposed to women, since an individual could only be committing carnal intercourse by introducing the penis into the anus or mouth, thereby saving females by reason of their biological make-up. Likewise, s. 289 of the CPC was said to be discriminatory of men as women were thereby completely exempted from whipping.

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Held (dismissing appeal and affirming convictions and sentences)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) Pertaining to the argument on s. 289 of the CPC, we do not think that it was the appellant's argument that for the legislation to be fair, females should be whipped too. (para 9)

(2) The new grounds supplied did not fall under s. 305 of the CPC which provides that there shall be no appeal except as to the extent or legality of the sentence. The sentences passed were clearly not excessive and had not militated against any known principles. (para 10(a))

(3) The fact that the appellant is a HIV patient offers no help to the appellant. With him riddled with HIV, what with the propensity and life style for certain sexual inclinations, to let him loose among young boys will do no good to society. The learned trial judges, in passing sentence, had struck a balance between the interest of the public and that of the appellant. (para 10(c))

(4) By so pleading guilty without reservation at the subordinate courts, the appellant had unequivocally admitted that when sodomising the victim, consent was never given. In any case, whether consent is given or not is irrelevant for a prosecution under s. 377B of the Penal Code, as opposed to a charge under s. 377C, and be it noted, it is the right of the Public Prosecutor to select the provision under which an accused person is to be charged. (para 10(d))

(5) Even if there had been a technical glitch herein whereby the "wrong" provision was preferred in the charges on the premise that consent was not given by the victim, the appellant was never prejudiced. With s. 377B discounting even a consensual relationship, and there being no failure of justice, the convictions were in order. (para 10(d))

(6) Without the suitable facts and antecedent supporting the constitutional questions, the issues were therefore argued in vacuum. Without the necessary nexus and mode of proceedings before us, this was therefore not the appropriate case or platform for the constitutional arguments to be canvassed. (para 10(f))

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Di hadapan dua Mahkamah Sesyen di bawah, perayu, seorang pesakit HIV, telah mengaku salah dan disabitkan atas kesalahan melakukan 22 kesalahan meliwat di bawah s. 377B Kanun
B Keseksaan dan dihukum 60 tahun penjara dan lapan sebatan rotan dengan hukuman penjara diperintahkan berjalan secara berasingan. Setelah gagal dalam rayuannya ke Mahkamah Tinggi, perayu merayu seterusnya dan berhujah di hadapan yang arif hakim-hakim rayuan di sini secara intinya bahawa: (i) s. 377B Kanun Keseksaan
C melanggari fasal 8(1) dan (2) Perlembagaan Persekutuan ('PP'); (ii) hukuman yang dijatuhkan adalah terlalu berat dan bertentangan dengan fasal 8 Perlembagaan Persekutuan bila dibaca bersama dengan s. 289 Kanun Tatacara Jenayah ('KTJ'); (ii) beliau tidak memberi dadah kepada mangsa yang berumur 14 tahun tersebut
D sebelum meliwatnya dan walau apa pun izin telah diberi oleh mangsa; dan (iv) hakim bicara telah membuat dapatan fakta yang salah bahawa jenayah yang serupa kini semakin merebak di Malaysia. Secara lebih khusus, ianya dihujahkan bahawa s. 377B (dan juga s. 377A) bersifat diskriminasi terhadap orang lelaki berbanding
E dengan orang perempuan, kerana seseorang hanya boleh melakukan 'carnal intercourse' dengan memasukkan zakarnya ke dalam dubur ataupun mulut, sekaligus mengecualikan orang perempuan dari jenayah tersebut. Begitu juga, s. 289 KTJ dikatakan mendiskriminasi orang lelaki kerana orang perempuan dikecualikan sepenuhnya dari
F hukuman sebat.

Diputuskan (menolak rayuan dan mengesahkan semua sabitan dan hukuman)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

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(1) Berhubung dengan hujah atas s. 289 KTJ, kami tidak fikir bahawa ianya menjadi hujah perayu bahawa untuk undang-undang menjadi adil, maka orang-orang perempuan juga harus dibolehkan disebat.

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(2) Alasan-alasan baru yang dihujahkan tidak terangkum ke dalam s. 305 KTJ yang memperuntukkan bahawa rayuan tidak boleh dibuat melainkan setakat tahap atau kesahan hukuman sahaja. Hukuman-hukuman yang dijatuhkan jelas tidak berlebihan dan
I tidak melanggar mana-mana prinsip yang diketahui.

(3) Fakta bahawa perayu seorang pengidap HIV tidak membantu perayu. Dengan beliau bergelut dengan HIV, sementelah dengan gaya hidupnya serta kecenderungan seksualnya, membebaskan beliau di kalangan anak-anak muda tidak memberi apa-apa manfaat kepada masyarakat. Yang arif hakim-hakim bicara, dalam menjatuhkan hukuman, telah dapat mengimbangi di antara kepentingan awam dan kepentingan peribadi perayu.

(4) Dengan membuat pengakuan bersalah di mahkamah-mahkamah rendah, perayu telah secara nyata mengakui bahawa apabila meliwat mangsa, izin tidak pernah diberi. Walau bagaimanapun, sama ada izin diberi atau tidak bukanlah merupakan persoalan relevan dalam satu pendakwaan di bawah s. 377B berbanding dengan pendakwaan di bawah s. 377C, dan sayugia diingat bahawa adalah menjadi hak Pendakwa Raya untuk memilih di bawah peruntukan manakah sesuatu pendakwaan itu hendak dijalankan.

(5) Jikapun terdapat kekhilafan teknikal di sini di mana peruntukan yang "salah" telah digunakan di dalam pertuduhan dengan alasan bahawa izin tidak diberi oleh mangsa, perayu tidak sekali-kali diprejudis. Dengan s. 377B mengenepikan sebarang perhubungan konsensual dan kegagalan keadilan pula tidak berlaku, maka sabitan-sabitan adalah teratur.

(6) Tanpa wujudnya fakta-fakta sesuai dan antecedent bagi menyokong persoalan perlembagaan yang dikemukakan, maka isu-isu telah dihujahkan di dalam vakum. Begitu juga, tanpa adanya nexus yang diperlukan serta tatacara prosiding di hadapan kami, ini bukanlah suatu kes atau medan yang sesuai untuk penghujahan isu-isu perlembagaan.

Legislation referred to:
Criminal Procedure Code, ss. 289, 305
Federal Constitution, art. 8(1), (2)
Penal Code, s. 377A, 377B, 377C

For the appellant - Fahri Azzat (Amer Hamzah Arshad with him); M/s Azzat & Izzat
For the prosecution - Shoba Venu Gobal; DPP

[Appeal from High Court, Shah Alam; Criminal Appeal No: 42-57 & 58-2007]

Reported by Wan Sharif Wan Ahmad

A

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant was charged with 22 charges of sodomy under s. 377B of the Penal Code against a 14 years and 7 months boy (the victim) from 18 April 2007 until 9 May 2007. Ten charges were tried and heard at Sessions Court 5 and another twelve at Sessions Court 6.

[2] The facts are as follows. The victim, one Mohd Farid bin Iskandar had filed a police report, stating *inter alia* that the appellant, a friend of his, had sodomised him at his home. But before sodomising him the appellant had given him something that had caused him to hallucinate. In the report the victim clearly stated that the appellant had inserted his penis into his anus at that house from 18 April 2007 until 9 May 2007. These facts were admitted by the appellant in the course of the proceedings when the facts were read out. The medical report confirmed the penetration as it stated that an "anal fissure at 1 o'clock measuring 0.5cm" and "an anal tear at 6 o'clock measuring 1 cm with signs of fibrosis" were detected at the victim's anus.

[3] The appellant admitted to the facts and thereupon pleaded guilty to the 22 charges at the abovementioned Sessions Court at Shah Alam. For easy reference, the charges, case numbers and sentences have been summarized in the following manner:

Case Number	Charge	Sentence
62-52-2007 (Court 6)	3 charges under s. 377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently.
62-54-2007 (Court 6)	3 charges under s. 377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.

62-56-2007 (Court 6)	3 charges under s. 377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62-58-2007 (Court 6)	3 charges under s. 377B Penal Code.	8 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62-53-2007 (Court 5)	3 charges under s. 377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently.
62-55-2007 (Court 5)	3 charges under s. 377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62-57-2007 (Court 5)	3 charges under s. 377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62-59-2007 (Court 5)	1 charge under s. 377B Penal Code.	7 years imprisonment and 1 stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.

[4] The Sessions Court judges had considered the following factors when meting down the sentences, *viz*.:

(a) the number of charges the appellant was charged with, namely 12 at Sessions Court 6, and 10 at Sessions Court 5;

(b) the maximum sentence under the relevant provision being 20 years;

(c) the victim was less than 15 years old and not mature enough to know the consequences of his act;

(d) the acts were repeated almost daily from 18 April 2007 until 9 May 2007;

(e) the issue of public interest, what with the rise of this type of cases in our society; and

(f) the danger of allowing the appellant to move freely within the fabric of society whence he is a threat to young boys.

[5] The appellant appealed to the High Court on the solitary ground of sentence in that he:

(a) had repented and requested for another chance; and

(b) would not repeat his mistake.

[6] Come the hearing day at the High Court the appellant denied giving the pills to the victim though did not deny the commission of the offence. With no retraction of the plea of guilt the High Court affirmed the conviction. The sentences were upheld founded on the offences being serious ones, what with the victim being very young and the acts amounted to absolute sexual abuse.

[7] When the matter came before us, the appellant for reasons known only to him and his counsel, filed several additional grounds of appeal, amongst them, that:

i. section 377B of the Penal Code is contrary to art. 8 (1) and (2) of the Federal Constitution;

ii. the sentences meted out are contrary to art. 8 of the Federal Constitution when read with s. 289 of the Criminal Procedure Code;

iii. the judge made a wrong finding of fact that such offences had increased in Malaysia; and

iv. that the overall sentences were too severe.

[8] The appellant had ventilated that s. 377B of the Penal Code is unconstitutional as it infringed art. 8(1) and (2) of the Federal Constitution. The combined effect of the latter article is that all persons are equal before the law and entitled to the equal protection, and there shall be no discrimination against citizens on the ground only of gender. In the course of the proceedings counsel abhorred the promulgation of s. 377B and questioned its legality. Under s. 377A of the Penal Code, to bring an individual within the realm of carnal intercourse, there must be an introduction of the penis into the anus or mouth. Learned counsel even ventilated that homosexuality should not be illegal as lesbianism is not. Counsel further submitted that a man is discriminated against just because of his biological make-up whilst the female is saved because of hers.

[9] Pertaining to s. 289 of the Criminal Procedure Code females are completely exempted from any whipping in all cases whilst males are exempted only in certain circumstances. We do not think that it was the appellant's view that for the legislation to be fair females should be whipped too. The appellant's counsel submitted that since s. 289 of the Criminal Procedure Code discriminated against males it thus must have violated art. 8(1) and (2) of the Federal Constitution.

[10] Ironically, despite having submitted in the above vein, which effect would have been the quashing of the charges and resulting in the setting aside of the sentences in the event of success, counsel had instead prayed that the sentences against the appellant be revised and substituted with a proportionate sentence. Having heard the appeal we dismissed it. The broad reasons, *inter alia*, for its dismissal are as follows:

a. the new grounds supplied do not fall under s. 305 of the Criminal Procedure Code. Under this provision it is provided that there shall be no appeal except as to the extent or legality of the sentence. Even the appellant acquiesced to this principle when he correctly cited the case of *R v. Leo de Cruz* [1935] MLJ 1. Unless this appeal falls under these circumstances the

court will not intervene. We, needless to say, found that the sentences are within the scope of the sentence permitted to be meted down by the court;

b. the sentences are not excessive or have militated against any known legal principles;

c. learned counsel for the appellant has also admitted that the appellant is an HIV (AIDS) patient. This information is certainly of no help to the appellant. With him riddled with HIV, what with a propensity and life style for certain sexual inclinations, to let him loose among young boys will do no good to society. We were satisfied that the learned Sessions Court judges had struck a balance between the interest of the public and the interest of the appellant;

d. the constitutional argument ventilated has a backdrop of the victim giving his supposed consent to the sodomy charges. As mentioned above he totally denied drugging the victim. This is far removed from the truth after having scrutinized the facts. By so pleading guilty without reservation at the subordinate courts, he unequivocally had admitted that when sodomising the victim, consent was never given. On the issue of consent it is trite that in Malaysia, whether consent is given or not, is irrelevant for a prosecution under s. 377B of the Penal Code, as opposed to a charge under s. 377C of the same Code. A person may be charged under the latter provision if no consent is forthcoming from the victim. Consent is the distinguishing element between the two provisions. But it must be understood that it is the right of the Public Prosecutor to select the provision for which an accused person is to be charged. In this case, even had there been a technical glitch, whereby the "wrong" provision was preferred in the charges, on the premise that consent was not given by the victim, the appellant was never prejudiced. With s. 377B discounting even a consensual relationship and there being no failure of justice the convictions here therefore were in order;

e. with the victim aged only 14 years and 7 months when sodomised, any liberal country which has legalized homosexuality between consenting parties so long as they are adults, will surely not tolerate the appellant's abhorrent excesses; and

f. without the suitable facts and antecedent supporting the constitutional questions, the issues were therefore argued in a vacuum. Without the necessary nexus and without proper mode of proceedings before us, this was thus not the appropriate case or platform, for the constitutional arguments to be canvassed.

[11] As we found no errors in the sentences meted down by the Sessions Court judges, which were also affirmed by the High Court we accordingly had dismissed the appeal.